

STATE OF VERMONT
DEPARTMENT OF EDUCATION

Special Education
Case #DP06-08

Due Process Hearing

ORDER

INTRODUCTION

A special education due process hearing request was filed by the parents in this matter on March 30, 2006. A hearing was held on May 23 and 24, and June 2, 8, 20 and 26, 2006 in South Royalton, Vermont. The parents were assisted by advocates Brice Palmer and Diane Drake. The school district (hereafter the “district”) was represented by Attorney Georgiana Miranda.

ISSUES

The issues in this case are:

- a. whether the STUDENT’S 2004-2005 (since March of 2004) Individual Education Plan (hereafter “IEP”), and his Interim IEP are appropriate;
- b. whether the parents are entitled to reimbursement of the costs of services provided to the STUDENT by the Stern Center;
- c. whether STUDENT has, since March of 2004, been eligible for special education services; and,
- d. whether the parents have had meaningful participation in the provision of a free appropriate public education (hereafter “FAPE”). for the STUDENT.

FINDINGS OF FACT

1. The STUDENT is a fifteen year old ninth grader who attends the district's high school.

2. The parents are both well educated professionals with significant knowledge of special education law.

3. During the spring of 2001 when the STUDENT was in the third grade, he was struggling with learning to read. (Testimony of mother).

4. In the fall of 2001, the STUDENT continued to struggle in school. In October the parents enrolled him in the Stern Center in White River Junction, Vermont. (Testimony of mother).

5. In January of 2002, the STUDENT was diagnosed with Orthographic Dyslexia, identified as learning disabled and found eligible for special education. (Parent's Exhibit (hereafter "P. Ex.") 41; Testimony of mother).

6. The STUDENT'S 2004-2005 IEP duration was from February 2004 to June 2004 and from August 2004 to February 2005. The page in the IEP entitled "Present Levels of Educational Performance" (hereafter "present levels") describes the characteristics of Orthographic Dyslexia as "poor rapid automatic naming, weak fluency skills, an over reliance on sounding words out, difficulty remembering how to spell high frequency words, difficulty copying, and repetitions, substitutions, and reversals while reading and writing." The student's cognitive ability is in the "high average range with high average to superior abstract reasoning skills. He has relative weakness in his auditory processing and processing speed abilities." (P. Ex.5).

7. The present levels section of the IEP continues to describe the

STUDENT as an “extremely hard worker” who is “very interested in learning” who “works well in groups, is very adaptable and gets along with teachers and peers. He is becoming more independent in his work and demonstrating a growing confidence in his reading [h]and writing abilities.” (P. Ex.5).

The present levels section also states that in reading, the STUDENT “knows six types of syllables and five syllabication rules. He should be able to use his knowledge of the syllable types with minimal assistance. He is able to read the first 1000 words on the Frye Instant Word list. He has strong phonological awareness skills...his decoding is slow due to his weak orthographic memory. It will take him much longer than his peers to read grade level material.” (P. Ex.5).

The present levels section continues that, although the STUDENT’S spelling skills are improving, he needs to start bringing what he learns in special education into the regular education classroom. It’s helpful to allow him to put his thoughts on paper and then go back and use COPS on his work. He has the most difficulty “spelling non-phonetic words...[he] is able to write in paragraph form. He has “great mathematical thinking skills, but he continues to have some difficulty with automaticity of math facts.” (P. Ex.5).

Under Annual Goals and Objectives in the IEP, the STUDENT has two Goals. The first Goal is Reading which states that the STUDENT will “use a variety of strategies to help himself read.” The evaluation procedures are “Teacher and Special Educator observation and assessment.” There are 7 Objectives under Reading. Each Objective states what the STUDENT is expected to do and to what degree. For example, Objective 1states that the STUDENT will “orally read grade level material with 90% accuracy and

Objective 3 states that his “oral reading of grade level material will reflect through accurate self-correcting when subsequent reading indicates a miscue. (P. Ex.5).

Under Goal 2, Written Language, the STUDENT “will draft, revise, edit and critique written products so that final drafts are appropriate.” The evaluation procedure is “Assessment of written work.” There are 6 Objectives under the Goal Written Language, such as, Objective 1 states that, when doing English language arts work, the STUDENT “will independently canalize the first word of each sentence and all proper nouns. (P. Ex.5).

In April of 2004, one goal and approximately nine objectives were added to or changed in the STUDENT’S IEP after the parents asked the instructor at the Stern Center to contact the STUDENT’S case manager/Special Educator, Deborah Velto, and make the IEP goals and objectives more specific. An Objective added to the Reading Goal states that he “will demonstrate retention and recall of the vowel digraph/diphthong syllables (ai, ay; ee, ey; oa, oe, ue; oi,oy, au, aw; ou, ow, oo; ea; and eu, ew, ui) by correctly reading words containing these syllables with 90% accuracy. An Objective added to the Written Language Goal states that “when writing words on a sample of his English language arts work, [the STUDENT] will represent each sound with a predictable, common spelling pattern (demonstrating knowledge of the six types of syllables: closed, silent-e, open, r-controlled, consonant-le, double-vowel syllables) with 80% accuracy.” Also added to the IEP was a Goal in Mathematics to improve his automaticity in math facts with two Objectives pertaining to accurately recalling division problems. (Testimony of father; P. Ex.9; P. Ex.12).

During October of 2004, the district began to schedule three year

evaluations including the STUDENT'S at Deer Creek Psychological Services with whom the district had a contract. (Testimony of Deborah Velto).

In early November of 2004, the Director of Special Services, Don McMahon, completed a school referral form to have the STUDENT'S three year re-evaluation conducted at Deer Creek. (P. Ex.20a).

There were no Education and Planning Team (hereafter "EPT") meetings or other discussion with the parents about the STUDENT'S evaluation between October 2004 and December 2004. (P. Ex. 19; P. Ex.20).

At the December 20, 2004 EPT meeting, the parents were told that the STUDENT'S evaluation was scheduled for January 3, 2005. The parents indicated that they would prefer the evaluation be done by the Learning Curve, the group that had conducted the STUDENT'S initial evaluation three years earlier. The district agreed but, as a result, the evaluation had to be rescheduled and completing the process took longer than anticipated by the district. Also at this meeting, one of the STUDENT'S teachers recommended that an Occupational Therapy (hereafter "OT") evaluation be done. The team agreed and it was scheduled for January 7, 2005. (Testimony of parent; Testimony of Deborah Velto; P. Ex. 27; P. E x. 30; P. Ex.33).

The Learning Curve Evaluation Report was sent to the district on February 21, 2005. The Report states that the STUDENT'S 2004-2005 IEP is appropriate but that it is critical that objectives be written for fluency. An O T evaluation was conducted on January 7 and 28, 2005. The OT report was dated March 9, 2005. (P. Ex.39a; P. Ex.48a).

On March 22, 2005, the parents received documents from the district that it intended to present at the meeting pertaining to adverse effect. These included the Vermont Department of Education (hereafter "DOE") Adverse

Effect (hereafter “AE”) form, work samples of the STUDENT and work samples of two other 7th graders. (Testimony of mother; P. Ex. 48)

Ms. Velto had written “NO” on 3 of the 5 AE measures on the AE form, “lowest 15%” on one of the STUDENT’S work sample and “Not lowest 15%” and/or “No adverse effect” on many other work samples while meeting with the teachers prior to the March 25th meeting. Ms. Velto stated that these notations were not answers to the questions determining eligibility. (Testimony of Deborah Velto; P. Ex.48).

The eligibility meeting was held on March 25, 2005. The parents expressed concerns about the accuracy of some of the documents presented by the district and the fact that the STUDENT was receiving substantial support in and out of school was not being considered. The team agreed that the STUDENT continued to have a Specific Learning Disability. Although the STUDENT’S teachers on the team did not feel that there was evidence of AE in their classrooms, the team agreed not to make an eligibility determination until more information was gathered from a classroom observation, a write up of each basic skill area, fluency measures with content reading, other in-class assessments and an averaging of tests. The team, also, agreed to extend the STUDENT’S current IEP until the eligibility determination was made. (P. Ex.51;Testimony of mother).

Before the March 25th meeting, the STUDENT’S teachers had reviewed all the written work, tests, assessments, etc. in his file and selected examples of what he was producing in a particular basic skill area at the time to present at the meeting on the question of adverse effect. (Testimony of Deborah Velto).

The parents believe that the STUDENT is clearly below 15% of his grade level peers in oral reading fluency. (Testimony of parent).

Ms. Velto's understanding is that reading fluency is not a basic skill area and that poor reading fluency is not a measure of adverse effect if reading comprehension is good. It is also her understanding that only comprehensive test scores can be considered not individual subtest scores. (Testimony of Deborah Velto).

The second "gate" of qualification for special education eligibility is that a student must be performing at the lowest 15% in at least one basic skill area as determined by three out of five measures. Basic reading, reading comprehension, written expression, math calculation are examples of basic skills. Overall writing skills is not a basic skill area. The four basic skill areas that were considered to determine eligibility for the STUDENT in April of 2005 were Basic Reading, Written Expression, Math Calculation and Reading Comprehension. The measures used to determine if the STUDENT was performing in the lowest 15% of grade level peers were standards-referenced tests, grades, criterion-referenced tests (except in written expression where not applicable) and other individualized measures. On the adverse effect worksheet, prepared by Ms. Velto, the only measure in any basic skill that placed the STUDENT below the 15% was first draft writing samples used in Written Expression.

The father sent a letter to Mr. McMahon, dated April 21, 2005, in which he expressed a desire to meet with the administration to discuss the district's adverse effect determination policy and his belief that eligibility had been predetermined and not supported by the evidence presented. (P. Ex.60).

During the April school vacation, Ms. Velto prepared and sent to the parents an approximately 20 page packet containing the STUDENT'S goals and objectives. Each objective was on a separate page followed by a written

description of what measures and other data had been used to measure and assess the STUDENT'S progress in achieving the objective or goal. The parents never asked to discuss this information with Ms. Velto. (Testimony of Deborah Velto).

On April 25, 2005, the father sent an email to Ms. Velto stating, that he disagreed with goals Ms. Velto had added to the STUDENT'S IEP because the decision to do so was not made by the team and that it was not appropriate to delay making corrections to the IEP until after an eligibility determination. Ms. Velto responded that in the future all communications would be forwarded to Mr. McMahon and he would be responding to the parents' concerns. (P. Ex.67, p. 4).

Ms. Velto felt that she had been trying to communicate with the parents but that they were communicating with Mr. McMahon about their concerns which included concerns about some of Ms. Velto's actions. (Testimony of Ms. Velto; P.Ex.74).

On April 28, 2005, the father attempted to review the STUDENT'S Resource Room notebook. He was told by Ms. Velto that he could not review the notebook without Mr. McMahon present. Ms. Velto wanted Mr. McMahon present because she felt the relationship with the parents was changing, and she wanted to have someone there to help her with the process and be a witness to what was said. (Testimony of Deborah Velto; P. Ex.70).

Also on April 28, 2005, the father, while doing a review of the STUDENT'S educational record, found an EPT Plan and Report stating that the STUDENT "does not demonstrate adverse effect in any basic skill area". (P.Ex.61, p.8).

The EPT meeting to determine eligibility was scheduled for May 3, 2005. It was rescheduled several times and took place on June 1, 2005.

On May 5, 2005, the parents met with members of the school administration to discuss their concerns. Later the same day, the parents wrote to Mr. McMahon to, in part, reiterate their concerns and to express their feeling that it had become obvious that the district members of the IEP/EPT team do not give their input and concerns consideration. The parents also stated that they disagreed with the district's evaluation and eligibility determination and requested an independent evaluation. (P. Ex.76).

On June 1, 2005, an IEP meeting was convened to develop an Interim IEP. The parents felt that the Interim IEP presented for discussion by Ms. Velto was not appropriate because they did not have updated progress reports, the goals were not specific to the STUDENT, the present levels of performance did not include how his disability affected his ability to progress and the short term objectives were not measurable with objective evaluation procedures within a given time. Ms. Velto asked the parents permission to add a fluency objective and they agreed. Ms. Velto added a fluency objective in the second draft of the Interim IEP. (Testimony of mother; Testimony of father; Testimony of Ms. Velto; P. Ex. 99; P. Ex.100; P. Ex.101; P. Ex.103, P. Ex.104, P. Ex.105; P. Ex.109).

Three drafts of the Interim IEP were developed. Although some of the goals and objectives were similar, many were different. The Written Language Goal in the 2003-2004 IEP was eliminated and two Writing Goals were drafted. Any objectives that are similar were in areas that still need to be addressed, however, the material to be used would more difficult. The present levels of performance in the Interim IEP were described differently but, as with the 2003-2004 IEP, they describe how the STUDENT'S disability affects his performance, his progress and involvement in the

general curriculum, his abilities, acquired skills, strengths and weaknesses. In both IEPs, the Goals and Objectives are measurable (Testimony of Deborah Velto; P. Ex.12; P. Ex.99; P.Ex.101P. Ex.103).

Ms. Velto believes the parents were expecting a numerical progress report instead of the S, S-minus and S-plus system that is used in all IEPs. (Testimony of Deborah Velto).

Because consensus about the Interim IEP did not occur at the June 1, 2005 meeting, another meeting was scheduled for June 9 (written on the meeting minutes as June 10 but actually held on June 9), 2005. Although the meeting was warned as an EPT meeting, Mr. McMahon asked if the parents' IEP concerns could be discussed. No one objected. The parents' belief, expressed through their advocate, was that another evaluation had to be done before an IEP could be developed. The meeting resulted in a plan that included scheduling a neuro-psychological evaluation at Dartmouth Hitchcock Medical Center (hereafter "DHMC"), reconsidering eligibility and reviewing the IEP goals and objectives when the evaluation became available. (P.Ex.102; P. Ex.109).

Also on June 9th, the parents wrote to Mr. McMahon and requested the following sentence be added to the STUDENT'S IEP. "Further evaluation is needed to determine present levels of educational performance." Their letter also included specific examples of IEP goals, a present level of performance and benchmarks they felt were needed for the goals and objectives to comply with IDEA. (P. Ex.137).

On August 18, 2005, the parents wrote to Mr. McMahon requesting a meeting to discuss the STUDENT'S program for the 2005-2006 school year. (P. Ex.109a).

The STUDENT'S neuro-psychological evaluation at DHMC was

scheduled for October 11, 2005. (P. Ex.109a).

An IEP meeting to discuss the STUDENT'S services was held on October 3, 2005. The parents had drafted a proposed interim IEP which was discussed at the meeting. The proposed IEP stated that the parents did not want the STUDENT to do homework in school. Instead of doing homework or classwork, they wanted him to work on organization skills during study hall. Ms. Velto stated at the meeting that it would be difficult to do this because, as part of the study hall that the STUDENT attends, the students are required to do homework. Another IEP meeting was scheduled for October 30, 2005. (P. Ex.121; P. Ex.122; P. Ex.126; Testimony of Deborah Velto).

Mr. McMahon was taken aback by the parents presenting a complete proposed IEP at the meeting. (Testimony of Mr. McMahon).

Four letters of the parents and Mr. McMahon between October 4 and October 20, 2005 illustrate the degree to which their relationship had deteriorated. In the first letter the parents stated, in part, that they had not received the portion of the STUDENT'S record they had requested, that they had been refused access to the records, and that they were dismayed by the district's delay tactics. They demanded that all the STUDENT'S records be placed in a particular room on October 7, 2005. Mr. McMahon's letter of October 10th, states that the IEP meeting scheduled for October 13th will have to be delayed to allow the district's new attorney an opportunity to review the IEP proposed by the parents. The parents replied on October 17th that they were disappointed in what seemed to be additional delays. They stated, in part: that they sent Mr. McMahon their proposed IEP 4½ hours before the October 3rd meeting and he did not take the time to review it; that less than an hour was spent discussing their IEP; that he ended the meeting after an hour; that the parents had not received notice of the meeting

including the time to be allowed; that two weeks had passed without the IEP meeting being rescheduled; and, that Appendix A of Part 300 of IDEA states that having attorneys attend IEP meetings should be “strongly discouraged” but they would not take the reference to an attorney as a “means of intimidation”. In his October 20th reply, Mr. McMahon stated that it would be premature to have an IEP meeting before the DHMC evaluation was completed and that the STUDENT’S current interim IEP meets his needs. (P. Ex.123, P. Ex.138, P. Ex.139, P.Ex.141).

Mr. McMahon’s October 20th letter was attached to a Notice of LEA Decision stating that the district’s interim IEP offers the STUDENT FAPE. (P. Ex.140).

The parents requested mediation in November 2005 in an effort to resolve the eligibility and interim IEP issues. (P. Ex.142).

In a letter to the parents, dated January 19, 2006, Mr. McMahon stated that, in their dealings with him and the school staff, they “have engaged in character assassination and distortion of the motives and efforts of the school when, in fact, the school had literally stood on its head to address your concerns and comply with your requests.” (P. Ex.149).

A mediation session was held on January 27, 2006. (P. Ex.153).

The parents sent emails, faxes and letters to Mr. McMahon on January 30, February 2, February 9 and February 10, 2006 to schedule an IEP meeting to discuss the STUDENT’S interim IEP that the parents understood Mr. McMahon agreed to at the mediation. (P. Ex.153; P. Ex.154; P. Ex.155; P. Ex.156).

A letter to the parents from Mr. McMahon, dated February 28, 2006, states that no signed agreement resulted from the January 27th mediation. (P. Ex.158).

The parents' February 10, 2006 letter to Mr. McMahon stated that the parents would be withdrawing the STUDENT from the district's special education services on February 27, 2006. The Stern Center would be providing the STUDENT'S IEP services and the parents would seek reimbursement for the cost. (P. Ex.156).

Starting in January of 2006, the STUDENT was showing signs of refusal behavior in his special education classes with Ms. Velto. The parents had also seen an emotional decline in the STUDENT over the past several months. (Testimony of Ms. Velto; P. Ex.156).

For some time before the STUDENT was removed from the school's special education services in the Resource Room, after the student came home from school, the mother took notes of exactly what he told her occurred with Ms. Velto in the Resource Room that day. (Testimony of mother).

Mr. McMahon sent a letter, dated February 15, 2006, to the parents stating that an IEP meeting cannot be held before the DHMC evaluation is completed because eligibility needs to be determined first. If the STUDENT is found eligible, an IEP team meeting will then be held. Mr. McMahon also stated that he contacted Janna Osman, a Department of Education consultant, who recommended several assessment tools that the EPT team could consider. (P. Ex.157).

An EPT meeting was held on April 24, 2006 to discuss the STUDENT'S eligibility for special education. The team discussed the DHMC neuro-psychological evaluation report finding that the STUDENT has a "reduced sensory input from his fingertip" which probably causes him "to press harder and require more visual control of his writing." The Report states that no evidence of additional disabilities was found but, based on the

STUDENT'S poor short term memory, a Central Auditory Processing screening was recommended. The team agreed that the screening should be done. In addition, the team agreed, as it had agreed at the September 20 and the October 3, 2005 team meetings, that the current Occupational Therapist, Diane Doubleday, should review the OT evaluation done in January of 2005 to determine if she agreed with its recommendations. The parents asked about the assessments recommended by Janna Osman but the district did not reply. Because the team could not reach consensus on the issue of eligibility, Mr. Mahon, as the LEA, made the decision that the STUDENT'S disability did not have an adverse effect on his educational performance. A Decision of the Evaluation Team Regarding Eligibility form dated April 24, 2006, indicating that the STUDENT does not meet the eligibility, was completed by Ms. Velto. (Testimony of father; P. Ex.170a; P.Ex.135).

Ms. Velto felt that most of the time she tried to listen to the parents concerns and fulfill their requests and had the STUDENT'S best interests in mind. (Testimony of Deborah Velto).

DISCUSSION

a). The appropriateness of the STUDENT'S 2004-2005 IEP and his Interim 2005-2006 IEP are appropriate.

It is well established that the "basic floor of opportunity provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). An IEP constructs the framework for providing educational benefit to a child. In part, an IEP must contain a statement of the child's present levels of educational performance including: "1.The child's abilities, acquired skills

and strengths; 2. How the child's disability affects the child's involvement and progress in the general curriculum..." There must also be measurable annual goals related to levels of performance. The goals must, in part, be stated as measurable short term objectives with projected dates of achievement, enable the child to be involved in the regular education curriculum, and provide parents with reports of the child's progress as often as other parents receive progress reports. VSER 2363.8.

Even though state and federal regulations identify areas that must be included in the IEP, the precise language is left to those drafting the document. "There is no legal authority requiring a particular level of specificity in the statement of annual goals." *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, No 97-3125, 1998 WL 251193 (10th Cir. May 19, 1998).

The drafting of the STUDENT'S 2005-2006 IEP was delayed initially because of the STUDENT'S three year evaluation and later because the district refused for months to develop an IEP until after the STUDENT'S eligibility for special education was determined. Eventually, an Interim IEP was drafted in June of 2005. During the next few months, it was modified twice at the parents' request to make it more specific.

The parents argue that the STUDENT'S 2004-2005 and Interim IEPs were inappropriate based, in part, on the fact that the goals and objectives are not specific to the STUDENT, the short term objectives are not measurable and the present levels of performance do not state how his disability affects his progress or how they are linked to his goals and objectives. The findings of fact above do not support their contention.

The present levels in the STUDENT'S 2004-2005 IEP are described in terms of his strengths, weaknesses, attitude, etc. and although no test

scores are included they are adequate. It is also acceptable that the present levels are described in the paragraphs on reading, writing and math on a present levels page and not listed with each goal. It is not difficult to link the present level information to each identified goal. The present levels in the Interim IEP contain test scores for reading, writing and math as well as narrative descriptions of his performance, strengths and weaknesses. The present levels in both the 2004-2005 and the Interim IEP are appropriate and meet the requirements of VSER 2363.8(a).

The parents cite *Evans v. Board of Education of the Rhinebeck Central School District*, 24 IDLR 338, (S.D.N.Y. 1996). It is not clear which of the parents' arguments this case is meant to support but it appears to be that the STUDENT'S IEP fails to address his individual needs. The child in the *Evans* had severe Dyslexia and was failing in every class, unlike the STUDENT who has Orthographic Dyslexia and is receiving As and Bs in all his academic subjects. Precisely because the purpose of every IEP is to develop a program for an individual, each child's current level of functioning, assessed needs and plan for specialized services must be presented differently. Given the difference in each child's diagnosis, abilities and educational performance, what is required for the IEP in *Evans* cannot prescribe what is required for the STUDENT'S IEP.

The parents also cite *Evans* to support their contention that the STUDENT'S goals and objectives are not objectively measurable. The STUDENT'S IEP, as does the IEP in *Evans*, contains references to "teacher observation" and "80% success." When "90% accuracy" appears in the STUDENT'S IEPs indicates the expected degree of achievement for a specific task described in each objective. In *Evans*, the objectives did not identify strategies to assess the child's progress. In addition, the

STUDENT'S parents were provided with 20 pages of explanation of the measures and data used for each objective to determine the STUDENT'S progress. Unfortunately, the parents did not ask to meet with Ms. Velto, to discuss the information she provided. Nor did Ms. Velto offer to meet with the parents discuss the significance of the material she had compiled.

The reading and written language objectives of the STUDENT'S 2004-2005 IEP do not contain the projected dates of achievement that are found in the math objective. In the Interim IEP, two of the Reading objectives as well as the Math objectives have projected dates. However, the 2004-2005 IEP ran from mid-year to mid year with summer vacation in between. It would seem logical that the projected achievement dates for the reading and writing objectives would be June as was the projected date for math. Had the Student's neuro-psychological evaluation been completed and available for review as expected, the Interim IEP would only have been in effect for several months and projected dates would not have been necessary.

The parents also contend that progress reports were not always provided in a timely fashion and that, prior to the removal of the STUDENT from the services provided in the resource room, they were not received at all. The evidence indicates that the last progress report was sent to the parents at the end of November 2005. Given the fact that the student was removed from special education services on February 27, 2006, it is not surprising that no additional reports were received from the parents. It is also not surprising that reports were not always on time given the level of tension and hostility between the parents and the district.

When these procedural omissions did occur, they constituted minor procedural errors that did not render the IEPs inappropriate, especially in a

case such as this, where the parents' participation in the development of the IEPs was significant. They did not result in the loss of educational opportunity or benefit for the STUDENT and thus they did not deprive him of his right to FAPE. *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990). See, also, *Grim v. Rhinebeck Central Sch. Dist.*, 346 F.3d 899 (2d Cir. 2003).

b. Are the parents entitled to reimbursement for the costs incurred by services provided to the STUDENT by the Stern Center?

Because the STUDENT'S 2004-2005 IEP and his Interim IEP provided the STUDENT with FAPE, the parents are not entitled to reimbursement for the costs incurred in connection with the services provided to the STUDENT by the Stern Center. 20 USC §1412(a)(10)(C); *CJN v. Minneapolis Public Schools*, 323 F.3d at 630, reh. den., reh, en banc, den. 2003 US Lexis 10804 and cert denied 540 U.S. 984, 124 S.Ct. 478 (2003).

c. Has the STUDENT, since March of 2004, been eligible for special education services?

The heart of the dispute between the parents and the district is the issue of the STUDENT'S eligibility for special education services. Under the Vermont Special Education Regulations, a child is eligible for special education if: 1. she/he has a disability; 2. as a result of the disability, there is "an adverse effect on the child's educational performance in one or more of the basic skill areas ..."; and, 3. the child is in need of special education. VSER 2362(a).

There is no dispute about the STUDENT'S disability. He was diagnosed with Orthographic Dyslexia in 2002 and the EPT team agrees that

he continues to have this disability. Beginning in 2002, the student was found eligible for special education until the spring of 2005 when the STUDENT'S 2005-2006 IEP was to be developed. It was not possible to hold an IEP meeting in February because the STUDENT'S three year re-evaluation was not available until the end of the month. The parties blame each other for the delay, but it is clear the district was at fault, given that evaluations are to be arranged by the EPT of which the parents are members. VSER 2362.2.2(a). Instead, Ms. Velto, without holding an EPT meeting, contacted Deer Creek Associates to evaluate the STUDENT. The parents objected and requested that the original evaluator do the re-evaluation. The district agreed but as a result development of the IEP was delayed.

In March of 2005, the parents received the documentation the district planned to present at the March 25, 2005 eligibility meeting including some STUDENT work samples and a DOE Adverse Effect form. The DOE form was marked "NO" in several places to indicate a lack of AE. The DOE form was completed by Ms. Velto in consultation with the STUDENT'S teachers. Subsequently, in April of 2005, while doing a record review, the father found an Evaluation and Planning Report for the STUDENT stating that his disability did not result in an adverse effect. This evidence contravenes the requirement that an eligibility decision is to be made by the EPT. VSER 2362(c)(1).

From April 2005 on, the relationship between the parents and the district deteriorated significantly. The district did not want to hold an IEP meeting until eligibility had been determined and the parents wanted an IEP developed immediately. IEP meetings were held on June 1 and 9, 2005 and an Interim IEP that appeared to be acceptable to the parents was eventually

drafted. By this time, approximately six months had elapsed since the parents had agreed to a re-evaluation in December of 2005, a time frame clearly in excess of the 60 days allowed for completion of the evaluation report. VSER 2362.2.3.

At the June 9th meeting the parents indicated that a neuro-psychological evaluation needed to be conducted before a new IEP could be drafted. The district agreed to the evaluation and it was to be scheduled at the DHMC. The evaluation was conducted on October 11, 2005 but the report was not available until the spring of 2006.

During the fall and winter of 2005, communication between the parents and the district became more contentious. In January 2006, the parties entered into mediation but nothing was resolved. A review of the STUDENT'S OT evaluation by the new OT never occurred. The parents were told by the district that a Department of Education consultant had recommended several assessments that might be helpful in determining eligibility but they were never administered to the STUDENT. An eligibility meeting was held on April 24, 2006 at which the DHMC evaluation report was reviewed. The report indicated that there was no evidence of additional disabilities but an auditory processing screening was recommended. This screening could produce information necessary for an eligibility decision. VSER2362.2.1(f). Because there was no consensus on eligibility, Mr. McMahon, as the LEA representative, decided that the STUDENT did not meet the adverse effect requirement.

The combination of: the selection of the evaluator made only by the district; a lack of knowledge concerning materials to be used and areas of consideration for the AE determination; evidence of pre-determination of the eligibility decision; failure to conduct assessments that were recommended

by experts that could provide important information to the EPT; and, permitting unnecessary delay, resulted in a violation by the district of the VSER Procedures for Evaluations and Determination of Eligibility. VSER 2362.2 2362 to VSER 2362.2.4.

d. Have the parents had meaningful participation in the provision of FAPE for the STUDENT?

The evidence establishes that the parents' level of participation in the evaluation, eligibility and IEP process for the STUDENT has been significant. Their participation as members of the STUDENT'S IEP team has exceeded expectations and has in no way been restricted by the district. The actions of the district have at times not permitted their participation to be as full as is required by law. These incidents are addressed in (c) above.

This case exemplifies what occurs when the relationship between parents and a school deteriorates over time to such a degree that the entrenchment and underlying emotional upheaval make it virtually impossible for civil communication to continue. Much of the six days of Hearing was spent producing documents to prove or defend a position from which compromise was not a possibility.

What should be the focus and priority of the relationship, the child's welfare, became secondary to the adults' ongoing battle. There is no doubt that both sides felt extreme frustration for what each considered indefensible action or inaction. That the STUDENT began have difficulty in school and show signs of emotional distress is no surprise. It is inevitable that the STUDENT be impacted on some level. The tragedy of this struggle, in which a tremendous amount of time and energy has been invested, is that, for the STUDENT, it has been counterproductive and detrimental both emotionally and academically.

ORDER

A. Within 30 days of the date of receipt of this ORDER the district shall:

- 1) Arrange for the district's OT to review the STUDENT'S OT evaluation.
- 2) Arrange for the STUDENT to take the tests and/or assessments recommended by Janna Osman that he has not already taken.
- 3) Arrange for an Auditory Processing screening of the STUDENT.
- 4) Arrange a conference call with the EPT, other of the STUDENT'S teachers if needed and an expert in the area of eligibility at the Department of Education such as Janna Osman to review what material, i.e. tests, classwork, scores, etc. to be considered by the EPT team in determining the STUDENT'S eligibility for special education.
- 4) Schedule an EPT meeting and arrange for a mediator/facilitator through the Department of Education to lead the meeting and arrange for an expert in the area of eligibility such as Janna Osman to attend the meeting and assist the team with the adverse effect gate (and any other gate if needed) of the eligibility determination.

B. Within 45 days of the date of receipt of this ORDER, the district shall convene an EPT meeting with a mediator/facilitator and an eligibility expert from the Department of Education for the purpose of determining whether the STUDENT is eligible for special education services.

- 1) If the district and parents are unable to agree on a mediator/facilitator and/or an eligibility expert, a list of three names shall be submitted to the Hearing Officer by each party and the Hearing officer shall select a

mediator/facilitator and an eligibility expert.

C. Within 60 days of the date of receipt of this ORDER the district shall convene an IEP or 504 meeting and arrange for a mediator/facilitator to lead the meeting to develop a plan for the STUDENT.

Dated this 5th day of September at Hartland, Vermont.

Catherine C. Stern, Esq.
Hearing Officer
Vt. Dept. of Education

Parties have a right to appeal this hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction pursuant to 20 U.S.C. §1415(e) and 34 C.F.R. §300.512, which must be commenced within 90 days of the date of this decision